Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1684

MEDARDO P. MEDELLIN, a/k/a MALO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Medardo P. Medellin, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not to be reported, but is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 25, 1980. No

Motion for Rehearing was filed on behalf of the petitioner. The jurisdiction of this court is invoked pursuant to 28 U.S.C.A. sec. 1254(1)(1966).

QUESTIONS FOR REVIEW

A. Whether petitioner's right to confront the witnesses against him was violated by the admission of statements of an absent individual, which statements implicated petitioner in illicit drug transactions, under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), without sufficient proof of a conspiracy independent of the statements of the absent individual?

B. What is the proper test for determining the sufficiency of the evidence to prove a conspiracy, independent of the statements of an absent individual alleged to be a co-conspirator, so that the co-conspirator exception to the hearsay rule can be applied, Fed. R. Evid. 801(d)(2)(E)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. VI.:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

Fed. R. Evid. 801(d)(2)(E):

> A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner was jointly indicted with Antonio M. Sosa and Stephen R. Alvarez by the United States Grand Jury for the Northern District of Texas for the offense of conspiracy to distribute heroin in violation of 21 U.S.C.A. sec. 846. The indictment also contained six (6) counts of distribution of heroin in which petitioner was jointly indicted with Antonio Sosa in violation of 21 U.S.C.A. sec. 841(a)(1) and 18 U.S.C.A. sec. 2. As part of the conspiracy count, it was alleged that petitioner would acquire heroin for distribution and that Antonio Sosa and Stephen R. Alvarez would obtain heroin from petitioner for sale and distribution.

A Fort Worth, Texas police officer, Michael Delaflor, and a special agent of the Drug Enforcement Administration, Eddie Brown, testified to working in an undercover capacity in order to negotiate, purchase and receive delivery of heroin from Antonio M. Sosa on March 15, March 30, April 2, April 11, April 26 and May 31, 1979. During the course of the transactions between Officer Delaflor, Agent Brown and Antonio Sosas, no direct evidence was obtained of petitioner delivering heroin to anyone, of conversations of petitioner with anyone, of petitioner possessing marked currency used to purchase heroin or of petitioner possessing heroin in marked glassine envelopes.

Throughout the negotiations between Antonio Sosa, Officer Delaflor and Agent Brown, Antonio Sosa, who did not testify at trial, made statements implicating petitioner as his "connection", and his "man". Antonio Sosa also was quoted as saying, "Malo" didn't want to see any people, referring to petitioner's nickname. Numerous other references made by Antonio Sosa about the petitioner were testified to at trial, all over the

objection of petitioner. All such out-of-court statements were admitted as declarations of a co-conspirator.

On May 31, 1979 a search warrant was executed on petitioner's residence and petitioner arrested. Petitioner was tried before a jury during the week of July 30, 1979 and found guilty on each count in which he was named in the indictment. On appeal to the United States Court of Appeals for the Fifth Circuit, petitioner's conviction was affirmed on March 25, 1980 by an unpublished per curiam opinion. The jurisdiction of the United States District for the Northern District Court, the court of first instance, was invoked pursuant to 18 U.S.C.A. sec. 3231 (1969).

REASONS FOR ALLOWANCE OF THE WRIT

A.

Declarations by one defendant may also be admissible against another defendant at trial upon a sufficient showing by independent evidence of a conspiracy among one or more other individuals and the defendant and if the declarations at issue were made in furtherance and during the course of that conspiracy. *United States v. Nixon,* 418 U.S. 683 (1974); *Anderson v. United States,* 417 U.S. 211 (1974); *Dutton v. Evans,* 400 U.S. 74 (1970); Fed. R. Evid. 801(d)(2)(E).

The United States Court of Appeals for the Fifth Circuit in *United States v. James,* 590 F.2d 575 (5th Cir. 1979) interpreted the language of the court in *United States v. Nixon,* supra, to require a standard of evidence to show a conspiracy to be by *"substantial, independent* evidence of a conspiracy at least enough to take the question to the jury." 590 F.2d at 581; see also *United*

States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976). Other courts have established the standard of evidence independent of the statements of an absent third party necessary to establish a conspiracy to be by a preponderance of the evidence, *United States v. De Fillipo,* 590 F.2d 1228 (2nd Cir. 1979); *United States v. Santiago,* 582 F. 2d 1128 (7th Cir. 1978); *United States v. Enright,* 579 F.2d 980 (6th Cir. 1978); *United States v. Bell,* 573 F.2d 1040 (8th Cir. 1978); *United States v. Kehoe,* 562 F.2d 65 (1st Cir. 1977) and by a prima facie showing *United States v. Davis,* 578 F.2d 277 (10th Cir. 1978); *United States v. Wood,* 550 F.2d 435 (9th Cir. 1976). There clearly exists a wide discrepancy in the standard to be applied to evidence, independent of out-of-court statements, to determine the existence of a conspiracy.

The United States Court of Appeals for the Ninth Circuit, in applying the standard of "prima facie" evidence that a conspiracy existed and the secondary requirement that only "slight evidence" connect a defendant to that conspiracy, held in *United States v. Weaver,* 594 F.2d 1272 (9th Cir. 1979) that the evidence was insufficient to allow the admission of out-of-court statements of an alleged co-conspirator. The only evidence available to connect the defendant to the conspiracy was that he was a passenger in a truck in which a wrapper of cocaine was found partly under the passenger's seat while a cocaine sale took place away from the truck.

The United States Court of Appeals for the Fourth and Fifth Circuits, applying varying standards, have held the evidence insufficient to establish the existence

of a conspiracy and the defendant's participation in it so as to allow the admission of out-of-court statements under the co-conspirator exception to the hearsay rule in: *United States v. Cuello,* 599 F.2d 635 (5th Cir. 1979) (prima facie standard); *United States v. Alvarez,* 584 F.2d 694 (5th Cir. 1978) (substantial evidence, preponderance nor prima facie standard met); *United States v. Zule,* 581 F.2d 1218 (5th Cir. 1978) (prima facie nor preponderance standard met); *United States v. Nettles,* 570 F.2d 547 (5th Cir. 1978) (beyond a reasonable doubt and slight evidence standard); and *United States v. Stroupe,* 538 F.2d 1063 (4th Cir. 1976) (substantial, independent evidence standard).

In the instant case, independent evidence of co-defendant Antonio Sosa's out-of-court statements showed that: (1) that Antonio Sosa sold heroin to law enforcement agents on March 15, 1979, March 30, 1979, April 2, 1979, April 11, 1979, April 26, 1979 and May 31, 1979; (2) that on each date of a sale of heroin Antonio Sosa was seen near or going into petitioner's residence between the time that Antonio Sosa was given money and the delivery of heroin to agents; (3) that on April 2, 1979 Antonio Sosa rode in an automobile driven by petitioner between the acceptance of money and the delivery of heroin (4) that on April 11, 1979 petitioner was seen getting in his automobile at the approximate time and location of the delivery of heroin to agents by Antonio Sosa; (5) that on May 31, 1979 a search of petitioner's residence recovered several small packages of heroin near the petitioner's location and lactose, tin foil and balloons. Each of the facts set forth above is as consistent with the innocence as the complicity of the

petitioner in a conspiracy. There exists fertile material for speculation, but it is not such that reasonable minds could conclude that it was inconsistent with the petitioner's innocence. *United States v. Cuello,* supra.

As regards the visit of Antonio Sosa to petitioner's residence, it was established that on only two (2) occasions petitioner was present and on those occasions, other individuals were also present. On April 2, 1979, the appearance of petitioner near the drug transfer was near the residence of petitioner's mother. On April 11, 1979, petitioner's presence near the drug transfer was during business hours in a neighborhood of bars, restaurants and other business establishments. Finally, at the time of the search of petitioner's residence, an officer who chased petitioner from the yard into the residence saw petitioner at all times and never saw petitioner place anything near his person before he was arrested. As in *United States v. Zule,* supra the presence of an individual near the scene of an illicit transaction is insufficient independent evidence to establish a conspiracy and the defendant's participation in it, regardless of the standard used to gauge the evidence independent of out-of-court statements.

B.

The last statement by the court regarding the co-conspirator exception to the hearsay rule is contained in *United States v. Nixon,* supra. Therein, although not necessary to the opinion, the court alluded to a standard of determining the sufficiency of the evidence, independent of out-of-court statements, required before out-of-court statements would be admitted under the co-

conspirator exception to the hearsay rule. The standard alluded to was the "substantial, independent evidence" test, 418 U.S. at 701 Note 4. Since that time a great variance of standards have been used and applied by the circuit courts of appeal.

In the Fifth Circuit, the court, in *United States v. James,* supra, established the "preponderance of evidence" standard as the proper yardstick. However, the establishment of a single standard did not remove discrepancies as shown in the later case of *United States v. Cuello,* supra, wherein the "prima facie evidence" standard was used after noting that the decision in *James* was not retroactive, 599 F.2d at 638 Note 7. Other courts of appeal have experienced the same variance as evidenced by *United States v. Stroupe,* supra, wherein each standard was cited by the court following the quotation of the court's language in *United States v. Nixon,* supra.

Clearly guidance is required to establish a uniform standard for determining the standard to be used in determining the sufficiency of the evidence independent of out-of-court statements to establish a conspiracy, and the defendant's participation in it prior to the application of the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801 (d)(2)(E). Such a uniform standard would serve the bench and the bar by removing uncertainty and aiding in the application of precedent to specific fact situations.

CONCLUSION

For these reasons, supported by the argument set forth above, petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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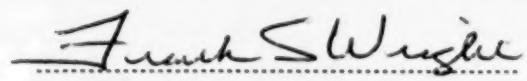
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable Kenneth J. Mighell, United States Attorney, c/o the Honorable John W. Sweeney, Jr., Assistant United States Attorney, 310 U.S. Courthouse, Fort Worth, Texas, 76102 on the same date shown on the letter of transmittal accompanying this petition.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5500
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MEDARDO P. MEDELLIN, a/k/a Malo,
Defendant-Appellant.

Appeal From the United States District Court
For the Northern District of Texas
(March 25, 1980)

Before BROWN, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

This is a direct appeal from a conviction and sentence imposed upon Medardo P. Medellin by the United States District Court for the Northern District of Texas.

Medellin was indicted on one count of conspiracy to distribute heroin in violation of 21 U.S.C. §846, and six counts of knowing and intentional distribution of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. § 2. A jury returned a verdict of guilty on each count, and Medellin received for each a sentence of fifteen years in prison and ten years on special parole, the sentences to run concurrently. He filed this appeal.

Medellin contends that the district court erred in concluding that certain testimony as to out-of-court declarations by one of his codefendants, Antonio Sosa,

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Fed. R. App. P. 34(a), 5th Cir. R. 18.

was admissible against him under Fed. R. Evid. 801(d)(2)(E) ("[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of a coconspirator of a party during the course and in furtherance of the conspiracy") In *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 47 U.S.L.W. 3786 (June 4, 1979), we held that a district court, before concluding that a statement is properly admissible under Rule 801(d)(2)(E), must find that "the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy." *Id.* at 582. Medellin claims here as he did below that the independent evidence adduced at his trial was insufficient to establish the existence of a conspiracy between himself and Sosa. As the district court specifically found, this claim has no merit. Independent evidence introduced by the prosecution established, at the least, that on several occasions, immediately after undercover officers gave Sosa money for heroin, Sosa went to Medellin's house or met with Medellin in Medellin's car and then returned to the officers shortly thereafter either with the heroin or with a promise that it would soon be delivered. When Medellin was arrested, police found in his house substantial quantities of heroin packaging material as well as heroin that had been packaged identically to the heroin the officers had received from Sosa. Medellin's further claim that, because he had no opportunity to

cross-examine Sosa at trial, the admission of the statements under Rule 801(d)(2)(E) operated to deny him his Sixth Amendment right to confrontation is without merit. *See Dutton v. Evans,* 400 U.S. 74, 80-81 (1970); *United States v. Johnson,* 575 F.2d 1347, 1362 (5th Cir. 1978), *cert. denied,* 440 U.S. 907 (1979).

Medellin also contends that the district court erred in admitting an officer's testimony that after Sosa had been arrested and the officer asked him to telephone "his source", Sosa was observed dialing Medellin's home telephone number. Even assuming that the admission of this testimony was error, the error in light of the cumulative nature of the testimony and the overwhelming independent evidence of Medellin's guilt, was clearly harmless. *See. e.g., United States v. Wells,* 525 F.2d 974, 976 (5th Cir. 1976).

AFFIRMED.